UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TESLA, INC.,	)	Case Nos. 32-CA-197020
	)	32-CA-197058
Respondent,	)	32-CA-197091
	)	32-CA-197197
and	)	32-CA-200530
	)	32-CA-208614
MICHAEL SANCHEZ, an individual,	)	32-CA-210879
JONATHAN GALESCU, an individual,	)	32-CA-220777
RICHARD ORTIZ, an individual, and	)	
INTERNATIONAL UNION, UNITED	)	
AUTOMOBILE, AEROSPACE AND	)	
AGRICULTURAL IMPLEMENT	)	
WORKERS OF AMERICA, AFL-CIO,	)	
a labor organization,	)	
	)	
Charging Parties.	)	

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations submits this brief as amicus curiae in response to the National Labor Relations Board's Notice and Invitation for Briefs. *Tesla, Inc.*, 370 NLRB No. 88 (2021).

The Board has requested briefs addressing whether "[a]n employer can[] avoid the 'special circumstances' test simply by requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union insignia." *Id.* slip op. at 1 (quoting *Stabilus, Inc.*, 355 NLRB 836, 838 (2010)). However, that question is not presented in this case, because the Tesla "team-wear" policy did *not* by its terms or as originally interpreted by the Company's supervisors prohibit wearing the union shirts at issue in this case.

Tesla's "team-wear" policy requires production employees "to wear black cotton shirts with the [Company's] logo" but also allows employees "to substitute all-black clothing for the

required team wear." 370 NLRB No. 88, slip op. at 1. In the spring of 2017, some employees at Tesla's Georgia production plant began wearing black shirts with the abbreviation "UAW" on the back and the phrase "Driving for a Fair Future at Tesla" on the front. ALJD 40. The production employees were allowed to wear the black union shirts until August 2017, when Tesla suddenly took the position that the shirts were not allowed under the team-wear policy. ALJD 42.

Tesla violated Section 8(a)(1) of the Act by enforcing its team-wear policy to prohibit the wearing of black t-shirts bearing the UAW insignia. However, because the team-wear policy is facially neutral as to shirts displaying union insignia and was previously interpreted to permit employees to wear black UAW shirts, the legality of a dress code or uniform requirement that inherently precludes the wearing of union insignia is not presented.

1. Section 7 of the National Labor Relations Act grants employees the right to engage in "self-organization, [and] to form, join, or assist labor organizations." 29 U.S.C. § 157. "The central purpose of the Act [is] to protect and facilitate employees' opportunity to organize unions to represent them in collective-bargaining negotiations." *American Hospital Association v. National Labor Relations Board*, 499 U.S. 606, 609 (1991). "[T]he right of employees to self-organize and bargain collectively . . . necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hospital v. National Labor Relations Board*, 437 U.S. 483, 491 (1978). Accordingly, the Act has long been understood to protect "the right of employees to wear union insignia at work," as it "has long been recognized as a reasonable and legitimate form of union activity." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 n.7 (1945) (quoting *Republic Aviation Corp.*, 51 NLRB 1187, 1188 (1943)).

Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7. 29 U.S.C. § 158(a)(1). "In the absence of 'special circumstances,' the prohibition by an employer against the wearing of union insignia violates Section 8(a)(1) of the Act." *United Parcel Service*, 312 NLRB 596, 597 (1993).

"Since 1945, a substantial body of law has evolved as to what constitutes 'special circumstances' justifying restrictions on the wearing of union insignia." *Stabilus, Inc*, 355 NLRB at 842 (M. Schaumber, dissenting in part). Application of the "special circumstances" test "turn[s] on fine distinctions based on a balancing of respective statutory interests and on unique factual circumstances." *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003), enf'd *Communications Workers of America, Local 13000 v. NLRB*, 99 Fed.Appx. 233 (D.C. Cir. 2004). Thus, to determine whether "special circumstances" justify prohibiting employees from wearing union insignia, "the entire circumstance of a particular situation must be examined to balance the potentially conflicting interests of an employee's right to display union insignia and an employer's right to limit or prohibit such display." *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982). By focusing on the context in which employees display union insignia, the special circumstances test gives employers an opportunity to advance legitimate justifications for limiting displays of insignia. *See Noah's New York Bagels*, 324 NLRB 266, 275 (1997) (finding that "special circumstances" justified prohibiting the wearing of a "mocking" t-shirt).

In *Wal-Mart Stores, Inc*., 368 NLRB No. 146 (2019), the Board held that "[w]here . . . [an] Employer maintains a facially neutral rule that limits the size and/or appearance of union buttons and insignia that employees can wear but does not prohibit them, a different analysis is required." *Id*. at 2. That holding was based on the belief that "the infringement on Section 7

rights is less severe" where an employer has merely maintained a "facially neutral" policy, and accordingly "the employer's legitimate justifications for maintaining the restriction do not need to be as compelling for its policy to pass legal muster." *Id*. at 2-3. An important practical reason advanced for being more lenient in these circumstances is that, "in a facial challenge to a policy that is not a total ban[,] . . . the Board must analyze it without the benefit of knowing the particular union graphic or insignia in question and the context in which it would be worn." *Id*. at 2 n. 10.

Whatever may be the case with respect to a facial challenge to a neutral dress policy, the normal standard applies where a policy has actually "been applied to restrict NLRA-protected activity." *The Boeing Company*, 365 NLRB No. 154, slip op. at 1 n. 4 (2017). Thus, "even when a rule's *maintenance* is deemed lawful, the Board will examine circumstances where the rule is *applied* to discipline employees who have engaged in NLRA-protected activity, and in such situations, the discipline may be found to violate the Act." *Id*. at 4-5. *See, e.g., St. Joseph's Hosp*., 225 NLRB 348, 348 (1976) (distinguishing the maintenance of "dress codes which stress the neatness of appearance of employees at all times" from the unlawful application of those dress codes).

The Board's decision in *Indiana Bell Telephone Company, Inc*., 370 NLRB No. 93 (2021), is illustrative of the proper approach in deciding whether the application of a dress code is an unfair labor practice. *Indiana Bell* involved "a mandatory dress code that requires [employees] to wear branded company apparel," which was applied to ban the wearing of union buttons. *Id*. at 1. The administrative law judge found that the Company violated Section 8(a)(1) both "by maintaining the appearance guidelines and by discriminatorily enforcing the guidelines against employees who wore the union buttons." *Ibid*. Instead of relying on either of these grounds, the

Board found that the employer had violated Section 8(a)(1) because it failed to establish "a special circumstance justifying the banning of union insignia." *Id*. at 2. This is the standard that should be applied in determining the legality of Tesla's application of its team-wear policy.

2. Prior to August 2017, there would have been no reason to suspect that Tesla's team-wear policy would be interpreted to prohibit production employees from wearing black shirts bearing union insignia. To the contrary, the policy expressly stated employees could substitute "all black clothing" provided that the clothing was "work appropriate." ALJD 40. And, the policy specified what it meant by "work appropriate" was clothing that was "mutilation free" and "pose[d] no safety risks." *Ibid*. The shirts worn by the UAW supporters in the spring of 2017 were clearly designed to come within the team-wear policy. And the Tesla supervisors obviously agreed, since they said nothing to the union supporters about the shirts until August. *Id.* at 42. Thus, there was no basis whatsoever for thinking that the team-wear policy itself would interfere with the right of production employees to wear black shirts bearing union insignia. In short, prior to the August 2017 application of the policy to ban wearing black union shirts, there would have been no legal basis for challenging the policy on its face.

In August 2017, Tesla first applied the policy to prohibit production employees from wearing black union shirts. Tesla has "argue[d] that its special circumstances for banning union shirts in GA [were] preventing mutilations to painted vehicles and . . . maintain[ing] visual management [of the workforce]." ALJD 45. However, these arguments "make[] little sense" for the simple reason that "the black colored Tesla assigned shirts are not substantially different from the black colored UAW shirts." *Ibid*. Moreover, "[n]ot one of Respondent's managers could affirmatively point to the union shirts" as the cause of mutilations, nor did Tesla present any other evidence to support that assertion. *Ibid.* "[G]eneral, speculative . . . or conclusory"

assertions of "special circumstances" are insufficient to justify applying a rule to prohibit wearing union insignia. *Boise Cascade Corp.*, 300 NLRB 80, 82 (1990). It follows, a fortiori, that nonsensical explanations for such restrictions do not suffice.[1]

* * *

The Board should find that Tesla violated Section 8(a)(1) by applying its team-wear policy to prohibit production employees from wearing black shirts bearing union insignia without showing any "special circumstances" justifying that interference with the production employees' protected Section 7 activity.

Respectfully submitted,

/s/ *Craig Becker*
Craig Becker
James B. Coppess
Patrick J. Foote
AFL-CIO
815 Sixteenth St. NW
Washington, DC 20006
(202) 637-5337
jcoppess@aflcio.org

Date: 3/22/2021

[1] Tesla's suggestion that its team-wear policy would permit employees to wear union stickers or hats, Tesla Br. 70, is legally irrelevant. Without an appropriate justification for distinguishing between different types of insignia displays, Tesla's attempt to dictate how employees convey union messages constitutes unlawful interference with their exercise of Section 7 rights. See *Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 865-66 (9th Cir. 2001) (when a government ban on a particular mode of expression affects "the manner in which a[n individual] communicates with the public," and thereby "precludes an important communicative aspect of public protest," the government's restriction must be tailored to ensure 'the "fit" between means and ends is reasonable.'") (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418 fn.13 (1993)).

CERTIFICATE OF SERVICE

I, Craig Becker, hereby certify that on March 22, 2021, the foregoing Amicus Brief was e-filed with the NLRB's Executive Secretary and served via e-mail on the following counsel this 22nd day of March 2021 upon each of the following:

Margo Feinberg
Schwartz, Steinsapir, Dohrmann & Sommers LLP
6300 Wilshire Boulevard, Suite 2000
Los Angeles, CA 90048
margo@ssdslaw.com

Mark Ross
Sheppard, Mullin, Richter & Hampton LLP
4 Embarcadero Center, 17th Floor
San Francisco, CA 94111
mross@sheppardmullin.com

Christy Kwon
Regional Attorney
National Labor Relations Board, Region 32
1301 Clay St., Suite 300N
Oakland, CA 94612
christy.kwon@nlrb.gov

/s/ *Craig Becker*